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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ALONZO F. WILLIAMS, Defendant and Appellant.	B187961 (Los Angeles County Super. Ct. No. LA044953)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kathryne A. Stoltz, Judge. Affirmed and remanded with directions.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Alonzo F. Williams appeals from a judgment entered after a jury found him guilty of seven counts of second degree robbery (Pen. Code, § 211; counts 2, 4, 6, 8, 10-12)[1] and one count of attempted robbery (§ 664, § 211; count 9) on retrial.[2] The trial court found true the allegations that appellant had suffered 13 qualifying prior conviction allegations of serious or violent felonies within the meaning of sections 667, subdivisions (b) through (i), and section 1170.12, subdivisions (a) through (d) [the "Three Strikes" law]; that he had suffered one prior conviction of a serious felony within the meaning of section 667, subdivision (a)(1); and that he had served one prior prison term within the meaning of section 667.5, subdivision (b). The jury found the weapon use allegation as to count 12 not to be true.

CONTENTIONS

Appellant contends that: (1) he was denied his right to effective assistance of counsel when his trial counsel failed to request a jury instruction on third party culpability; (2) the trial court misunderstood the scope of its authority when it sentenced him under the Three Strikes law; and (3) the abstract of judgment should be corrected.

FACTS AND PROCEDURAL HISTORY

Viewing the record in the light most favorable to the judgment below as we must (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1139), the evidence established the following.

Count 2

On September 29, 2003, appellant entered a restaurant and approached John Rivera, an employee of the restaurant. Appellant politely asked Mr. Rivera where the restrooms were located. Appellant was standing three feet away from Mr. Rivera, in a brightly lit area. Mr. Rivera noticed that appellant was African-American, his left eye wandered, he appeared to be in his thirties, and he was about six feet tall. Upon his

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[1] All further statutory references are to the Penal Code.

[2] At the first trial, the People dismissed counts 3, 5, 7 and 14 pursuant to section 1385. The first jury found appellant not guilty of count 1, but could not reach unanimous verdicts as to the remaining counts. Appellant's motion to dismiss was denied as to count 12, but granted as to count 13.

return, appellant put a tan, leather-bound notebook with a zipper on the countertop. He quietly asked Mr. Rivera to empty the money from the register into the notebook and told him that he had a gun. Mr. Rivera put about $400 in the notebook. Appellant told Mr. Rivera to turn around and count to 10 while he left the restaurant. Mr. Rivera identified appellant at a six-pack photo lineup on February 4, 2004. He also identified appellant and the notebook at trial. Following denial of appellant's *Romero*[3] motion to strike prior convictions, he was sentenced to consecutive terms of 25 years to life for each of the eight substantive counts pursuant to section 667, subdivision (b) through (i), and section 1170.12, subdivisions (a) through (d), plus a consecutive five-year enhancement pursuant to section 667, subdivision (a)(1), for an aggregate term of 205 years to life.

Count 4

On December 12, 2003, appellant entered a restaurant and approached Zachary Rogers, an employee. Mr. Rogers noticed that appellant was African-American and had a lazy eye that turned outward. Appellant asked Mr. Rogers for change to make a phone call, then placed a wallet type organizer on the counter and told him to put the money from the register into the wallet, or he would blow his head off. Appellant stood within two feet of Mr. Rogers and acted very calm. After Mr. Rogers put the money in the organizer, which was unzipped, appellant asked him to accompany him to the front door. Mr. Rogers did not identify any robbery suspect from a six-pack of photos shown to him within a week of the robbery. That photo lineup contained a picture of William Carter,[4] but did not contain a picture of appellant. Mr. Rogers identified appellant in a subsequent six-pack photo lineup on February 4, 2004, and at trial. He also identified the organizer at trial.

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3 *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

4 William Carter is the man that appellant contends was the lazy-eyed third party actually culpable for the crimes charged.

Count 6

On December 18, 2003, appellant entered a restaurant and approached employee Lizbeth Lopez. Ms. Lopez noticed that appellant was African-American and had a lazy eye. Appellant asked for $1 in change, then told her to put all the money from the register into his binder. Appellant threatened to blow her brains out. Ms. Lopez refused appellant's order to accompany him outside the restaurant. She complied with his order to walk to the end of the restaurant. On January 21, 2004, Ms. Lopez identified appellant from a six-pack photo lineup. She also identified him at trial and on other occasions in court. She identified the organizer at trial.

Count 8

On January 2, 2004, appellant entered a restaurant and approached Luis Rodriguez, an employee. Mr. Rodriguez noticed that appellant was African-American, had a crossed eye, and that he was about 5'8" tall. Appellant wore a blue-green jacket. Appellant asked where the telephone was, went to the telephone, then returned and put a leather binder on the counter, ordering Mr. Rodriguez to put money from the register into the binder. He told Mr. Rodriguez he had a weapon in his pocket. On January 19, 2004, Mr. Rodriguez identified appellant from a six-pack photo lineup. He also identified appellant at a live lineup and on other occasions in court. At trial, Mr. Rodriguez identified a Florida Marlins jacket as familiar looking. He also identified the organizer at trial.

Count 9

On January 5, 2004, appellant entered a restaurant and approached Jennifer Stivers, an employee. Ms. Stivers noticed that appellant was African-American and had a lazy eye. Appellant asked for a take-out menu and change for $1. He told Ms. Stivers that he had a gun, and ordered her to give him change for a $10 bill and empty the money from the register into his zippered leather case. Appellant stood a foot and a half away from Ms. Stivers. Ms. Stivers threw the $10 bill back into the register, slammed it shut, and ran out of the restaurant toward a bus station, screaming for the owner. Ms. Stivers reported the incident to the police and on January 19, 2004, identified appellant from a

six-pack photo lineup. Ms. Stivers also identified him at a live lineup on September 15, 2004, at trial, and in other court proceedings.

Count 10

On January 9, 2004, appellant entered a restaurant and approached Jeff Skinner, an employee. Mr. Skinner noticed that appellant was African-American and had a lazy eye. Appellant was about 35 to 45 years old and weighed about 180 pounds. Appellant claimed to have a gun and ordered Mr. Skinner to place the money from the register into his black organizer. Pursuant to appellant's instructions, Mr. Skinner walked outside the restaurant and counted to 60. On January 17, 2004, Mr. Skinner identified appellant from a six-pack photo lineup. At trial he identified appellant and the black organizer.

Count 11

On January 9, 2004, appellant entered a restaurant and approached Natalie Sanchez, an employee. Ms. Sanchez noticed that appellant was African-American, and had a lazy eye that drooped down in the corner. After another customer left, appellant told Ms. Sanchez to empty the money from the register into his brown organizer. As Ms. Sanchez hesitated out of shock, appellant grabbed her arm and told her he would shoot her if she screamed. Ms. Sanchez put money from the register into the folder and appellant left. On January 17, 2004, Ms. Sanchez identified appellant from a six-pack photo lineup. She also identified appellant at a live lineup, at trial, and at other hearings.

Count 12

On January 13, 2004, appellant entered a restaurant wearing khaki shorts and a Hawaiian shirt. Appellant ordered a small pizza from Milagro Ramos, an employee. When Ms. Ramos handed appellant's change to him, he told her to put the money from the register into his brown leather folder. Ms. Ramos thought appellant held a knife. She emptied the register, activated the silent alarm, then accompanied appellant to the door, at his order.

On January 17, 2004, Ms. Ramos identified appellant from a six-pack photo lineup. She also identified appellant at a live lineup, at trial, and at previous hearings. At trial,

Ms. Ramos identified a Hawaiian shirt as similar to the one appellant wore during the robbery.

Prosecution Evidence

On January 16, 2004, Los Angeles Police Officer Dorian Brown stopped appellant because his car registration was expired. Officer Brown noticed that appellant matched the description of the robbery suspect in the aforementioned robberies because he had a lazy eye and matched the height, weight, physical, and racial description. Moreover, appellant was driving a Mercedes-Benz, which had been identified as the type of vehicle driven by the robbery suspect. With appellant's consent, Officer Brown searched the car and found numerous plastic inserts for a notebook organizer.

Los Angeles Detective Steve Koman prepared a six-pack photo lineup that included a photograph of appellant. He also viewed videotapes of the robbery from some of the restaurants, but the features of the robber were unclear. Detective Koman searched appellant's apartment and found a number of organizers, including one that was burgundy colored and one that was black. He also found a teal colored Florida Marlins jacket and two Hawaiian shirts. According to Detective Koman, one of the victims stated the robbery suspect had driven a tan or gold Mercedes-Benz.

Other detectives from the Van Nuys station who had initially investigated the incident before Detective Koman took over the investigation, showed photographs of Mr. Carter to four robbery victims. Three victims did not identify Mr. Carter, and only one person tentatively identified Mr. Carter as the perpetrator. Mr. Rogers was the only victim in the current matter who viewed the photo lineup containing Mr. Carter's photograph, and he did not identify him as the robbery suspect. Because Mr. Carter did not fit the height, weight, or physical description of the robbery suspect, Detective Koman did not put his photograph in the six-pack photo lineup that contained appellant's picture. Mr. Carter was 5'5" tall and weighed 130 to 140 pounds, and did not have a lazy eye. At trial, Detective Koman stated that Mr. Carter appeared to be younger in his photograph than appellant. In the photograph, Mr. Carter appeared to have a lazy eye.

DISCUSSION

I. Whether appellant's counsel rendered ineffective assistance of counsel

Appellant contends that his trial counsel was ineffective because she presented evidence of third party culpability and referred to it in her closing argument, but never requested an instruction on third party culpability. We disagree.

To demonstrate ineffective assistance of counsel, a defendant must show counsel's performance was deficient because his or her representation fell below an objective standard of reasonableness, as well as prejudice flowing from counsel's performance. (*People v. Price* (1991) 1 Cal.4th 324, 386-387, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1165.) The appellate court will reverse convictions on the ground of inadequate counsel only if the record affirmatively discloses that counsel had no rational tactical purpose for his or her act or omission. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1051.)

"[T]he duty of counsel to a criminal defendant includes careful preparation of and request for all instructions which in his judgment are necessary to explain all of the legal theories upon which his defense rests." (*People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7, overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684.)

Appellant urges that in his closing argument, trial counsel referred to Detective Koman's testimony that Mr. Carter appeared to have a lazy eye in his photograph, and was 5'6" tall and 130 to 140 pounds. In closing argument, trial counsel argued that Mr. Carter matched some of the victims' descriptions and "may, in fact, be the person that did this." Appellant now complains that his counsel was ineffective by failing to request that the jury be instructed with CALJIC No. 4.50 as follows: "You have heard evidence that a person other than the defendant may have committed the offenses with which the defendant is charged. The defendant is not required to prove the other person's guilt beyond a reasonable doubt. Defendant is entitled to an acquittal if the evidence raises a reasonable doubt in your minds as to the defendant's guilt. Such evidence may by itself raise a reasonable doubt as to the defendant's guilt. However, its weight and significance, if any, are matters for your determination. If after consideration of this

evidence, you have a reasonable doubt that the defendant committed this offense, you must give the defendant the benefit of the doubt and find [him] [her] not guilty."

We conclude that trial counsel had good reason not to request the third party culpability instruction. "[T]o be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325.) Here, there simply was no evidence linking Mr. Carter either directly or circumstantially to the actual perpetration of the crime. Detective Koman's testimony that Mr. Carter may have appeared to have a lazy eye in his photograph was not sufficient to support a theory or instruction based on Mr. Carter's third party culpability. Indeed, Mr. Rogers, who viewed the photographic lineup including Mr. Carter's photograph, did not identify him as a suspect, but chose appellant from a subsequent photo lineup. Thus, even had trial counsel requested the instruction, the trial court could properly have refused to have given it because it was not supported by the evidence.

Moreover, even had trial counsel requested the instruction, the trial court could have refused to give the instruction because it duplicated other instructions to the extent that the jury was instructed that a defendant is presumed innocent until the contrary is proved and the People had the burden of proving beyond a reasonable doubt that appellant was the person who committed the crime with which he was charged.[5] (*People v. Turner* (1994) 8 Cal.4th 137, 203.)

Finally, trial counsel may have had a tactical reason not to request the instruction because her general argument was that appellant's identity as the perpetrator of the charged crimes had not been proven beyond a reasonable doubt. She may have thought

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5 The jury was instructed with CALJIC No. 2.91, in pertinent part, as follows: "The burden is on the People to prove beyond a reasonable doubt that the defendant is the person who committed the crime with which he is charged. [¶] If, after considering the circumstances of the identification and any other evidence in this case, you have a reasonable doubt whether defendant was the person who committed the crime, you must give the defendant the benefit of that doubt and find him not guilty."

that the instruction which appellant claims should have been given was unnecessarily limited to the potential culpability of Mr. Carter, and duplicative of CALJIC No. 2.91.

Nor has appellant shown that counsel's failure to request the instruction caused him prejudice. The jury was properly instructed that the People had the burden of proving appellant guilty beyond a reasonable doubt. And, the evidence strongly supported appellant's conviction. Every single victim identified appellant as the perpetrator in a photographic lineup and at trial; each victim viewed appellant for a substantial period of time in good lighting from a few feet away; and physical evidence including clothing and zipper organizers were found in appellant's car and residence.

We conclude that appellant has not shown ineffective assistance of counsel.

II. Whether the trial court misunderstood the scope of its authority when it sentenced appellant under the Three Strikes law

Appellant next contends that the sentence imposed by the trial court should be vacated and remanded for resentencing because the trial court did not understand the scope of its discretion in sentencing appellant under the Three Strikes law. We disagree.

"[I]n cases charged under [the Three Strikes law], a court may exercise the power to dismiss granted in section 1385, either on the court's own motion or on that of the prosecuting attorney, subject, however, to strict compliance with the provisions of section 1385 and to review for abuse of discretion." (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 504.)

In order to strike a prior conviction, the trial court must consider "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies. If it is striking or vacating an allegation or finding, it must set forth its reasons in an order entered on the minutes, and if it is reviewing the striking or vacating of such allegation or finding, it must pass on the reasons so set forth." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Here, the trial court found true that appellant had suffered 13 qualifying prior convictions of serious or violent felonies within the meaning of sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d); that he had suffered one prior conviction of a serious felony within the meaning of section 667, subdivision (a)(1); and that he had served one prior prison term within the meaning of section 667.5, subdivision (b). At the sentencing hearing, the trial court stated that it had considered the probation officer's report; the *Romero* motion filed by defense counsel; a letter in support written by one of appellant's previous employers; and a handwritten letter written by appellant. The trial court also considered statements made by appellant on his own behalf.

The trial court stated that it had given the *Romero* motion a great deal of thought. It noted that: appellant had previously been convicted of multiple crimes, including 13 robberies or attempted robberies in 1991; the previous 21-year sentence did not deter appellant from committing robberies again; the current crimes were planned and premeditated over a period of time; the victims were terrified during the robberies; the repetitive nature of the robberies indicated that appellant is a danger to the public; and imprisonment of appellant was necessary to protect the public. The trial court then declined to strike any priors. We conclude that the trial court was well aware of its discretion to strike appellant's priors, and that it acted within its discretion in determining that appellant did not fall outside the Three Strikes parameters.

We disagree with appellant's argument that because the trial court stated that the maximum sentence under a second strike would be 28 years rather than 29 years under the proper calculation, it misunderstood the scope of its authority. Appellant convinces us only that the trial court either misspoke or made an error in addition. Nor are we persuaded that the trial court did not understand its discretion because it should have, but did not consider its authority to strike prior convictions on a count-by-count basis. Appellant contends the trial court did not consider the possibility of imposing a three-strike sentence on count 2 (25 years to life), striking all but one of the prior strikes, and then imposing a consecutive term of one-third the middle term doubled (two years) on

each of the remaining seven counts of conviction, plus a consecutive term of five years for the section 667, subdivision (a)(1) enhancement, resulting in an indeterminate term of 44 years to life. We are not convinced that appellant has affirmatively shown that the trial court was unaware of its discretion to strike prior convictions or abused its discretion in concluding that appellant did not fall outside the spirit of the Three Strikes law simply because the trial court did not lay out all alternative sentencing schemes.

We conclude that the trial court did not abuse its discretion in denying appellant's motion to strike prior convictions under *Romero.*

III. The abstract of judgment should be corrected

Appellant contends, and the People concede, that while the abstract of judgment indicates appellant committed each of his current crimes in 2003, the record shows he committed the crimes in counts 8 through 12 in 2004.

We agree that the trial court must be ordered to amend the abstract of judgment to state that appellant committed the crimes in counts 8 through 12 in 2004. (*People v. Mitchell* (2001) 26 Cal.4th 181, 188.)

DISPOSITION

The matter is remanded with directions to the trial court to correct the abstract of judgment to reflect that appellant committed the crimes in counts 8 through 12 in 2004. In all other respects, the judgment is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST